QUESTION PRESENTED

The amicus curiae adopts the statement of the question presented by respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
BRIEF OF C. L. GRIMES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS	1
I. Interest of the Amicus Curiae	2
II. Summary of Argument	3
III. Argument	4
A. The "Delaware Settlement" Is a Major Abuse of Class Action Procedure Which Should Be Ended by This Court	4
B. Three Points Which Amicus Respectfully Suggests the Court Bear in Mind in Formulating Its Opinion in This Case	12
1. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That Breach of Fiduciary Duty Claims Under Delaware State Law Depend on the Same Facts as Do Federal Disclosure Claims	12

2. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That Merely Objecting to a Proposed Class Action Settlement on the Ground That It Releases Claims That Were Never Pleaded Constitutes Issue-Preclusive Litigation of the Underlying Facts of Those Claims	14
3. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That a Non-Resident's Tender of Stock in a Delaware Corporation Pursuant to a Tender Offer Justifies the Delaware Courts in Forcing Him Into a Non-Opt-Out Class in Which His Federal Rights Can Be Released Without His Consent	17
IV. Conclusion	19

TABLE OF AUTHORITIES

Page

Cases

Barkan v. *Amsted Industries, Inc.*, 567 A.2d 1279 (Del. Super. 1989) 15

Eastman v. *Symonds*, 108 Mass. 567 (1871) .. 16

Garr v. *U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994) 4

Greenfield v. *U.S. Healthcare, Inc.*, 146 F.R.D. 118 (E.D. Pa. 1993), *affd. sub nom. Garr* v. *U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994) 8

Grimes v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994) ..... *passim*

Halyalker v. *Board of Regents*, 72 N.Y. 261, 527 N.E.2d 1222, 532 N.Y.S.2d 85 (1988) 16

In re GMC Pick-Up Trucks Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) ... 9

In re Vitalink Communications Corporation Shareholders Litigation, [1991-92 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,585 (1991), *affd. sub nom. Grimes* v. *John P. McCarthy Profit Sharing Plan*, 610 A.2d 725, *cert. denied*, 113 S. Ct. 179 (1992) ... 2

James Talcott, Inc. v. *Allahabad Bank, Ltd.*, 444 F.2d 451 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971) 16

Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982) 16

Table of Authorities Continued

Page

Nottingham Partners v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) 9

Polk v. *Good*, 507 A.2d 531 (Del. Super. 1964) . 15

Prezant v. *De Angelis*, 636 A.2d 915 (Del. 1994). 15 n.6

Pritzker v. *Yari*, 42 F.3d 53 (1st Cir. 1994) 19 n.9

Rome v. *Archer*, 564 A.2d 1089 (Del. Super. 1989) 15

Shaffer v. *Heitner*, 433 U.S. 186 (1977) 18

Regulations

17 C.F.R. § 240.10b-5 12

Treatises

RESTATEMENT, JUDGMENTS 2D § 27 comment *d* . 16

Legislative and Administrative Materials

Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, S. HRG. 103-431, 103D CONG., 1ST SESS. (1993) 7 n.2

Remarks by Chairman, Arthur Leavitt . . . Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994 4

Table of Authorities Continued

Page

Legal Articles

Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STANFORD L. REV. 497 (1991) 7

Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983) 7 n.2

Coffee, *Suspect Settlements in Securities Litigation*, NEW YORK LAW JOURNAL, March 28, 1991, p. 5 col. 1 ..... 6-7, 9-11

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Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) 7 n.2

Haudek, *The Settlement and Dismissal of Stockholders' Actions–Part II: The Settlement*, 23 SW. L.J. 765 (1969) 16

Romano, *The Shareholder Suit: Litigation Without Foundation?*(unpublished study) . 7

Table of Authorities Continued

Page

Other Articles

Baron, *An Asbestos Settlement With a Hidden Agenda*, WALL ST. JOURNAL, May 6, 1993, p. A11, col. 3 9

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Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, p. A15 .. 7

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Table of Authorities Continued

Page

Millions for Us, Pennies for You: Suits on Behalf of Investors Enrich Lawyers, But What About Their Clients?, NEW YORK TIMES, December 19, 1993, Section 3, p. 1 7-8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1809

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., and MATSUSHITA HOLDING CORP.,
Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF C. L. GRIMES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

C.L. Grimes files this brief as amicus curiae pursuant to written consents of the petitioners and respondents, which have been lodged with the Clerk.

Amicus Grimes respectfully urges that the decision of the court below in this case be affirmed. It was clearly correct and will go far to suppress the "Delaware settlement," a procedure with a history of abuse and great potential for further abuse.

Grimes's purpose in filing this brief is twofold: to emphasize the "Delaware settlement" as an egregious misuse of class action procedure which should be put to an end, and to invite the Court's attention to certain matters so as to ensure that its opinion affirming the

decision below will not inadvertently appear to decide certain related issues in a way that might undercut the result.

I. INTEREST OF THE AMICUS CURIAE

Amicus Grimes is active in corporate law reform matters, especially in the areas of shareholder democracy; corporate governance; executive over-compensation; and efforts to suppress the "Delaware settlement," whereby legitimate federal securities claims are collusively bargained away by purported "class representatives" in Delaware state court. His perspective is that of a substantial and serious investor, and is distinctly not that of a corporate gadfly, or that of the professional plaintiff who holds nominal shares so as to serve strike-suit lawyers as a class action "representative."[1] He was one of the plaintiffs (and subsequently one of the petitioners for certiorari in this Court) in *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied,* 115 S. Ct. 480 (1994) (No. 93-2098), which is a prominent case in the relevant area of the law and was relied on by petitioners herein as presenting a conflict with the decision below in this case. He was also an objector to the "Delaware settlement" in the corresponding Delaware state proceeding and a petitioner for certiorari therein. *In re Vitalink Communications Corporation Shareholders Litigation*, [1991-92 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,585 (1991), *affd. sub nom. Grimes* v. *John P. McCarthy Profit Sharing Plan*, 610 A.2d 725, *cert. denied,* 113 S. Ct. 179 (1992) (No. 92-13).

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[1] For example, in the Vitalink litigation discussed herein, Grimes was the owner of 200,000 shares, worth $2.1 million even at the tender offer price.

II. SUMMARY OF ARGUMENT

The "Delaware settlement," under which a defendant or potential defendant can buy immunity from federal securities liability by procuring a release (for nominal consideration plus a generous attorney's fee) from a purported "class representative" in a state court class action alleging breach of Delaware law, is an abuse which should be ended by this Court.

In addition, in addressing the questions presented by the case at bar, the Court should be aware of several questionable determinations by the Third Circuit in *Grimes* v. *Vitalink*. These included a holding that a federal Exchange Act disclosure action involves the same factual issues as does a Delaware state breach of fiduciary duty claim, so that disposition of the latter produces issue preclusion as to the former; a holding that a class member who merely objects at the settlement hearing that the class representative is giving away, for an inadequate consideration, valuable claims which had not even been raised in the action, has thereby conducted an issue-precluding "litigation" of those claims; and a holding that a non-resident stockholder in a Delaware corporation who tenders his stock in a tender offer thereby submits to the jurisdiction of Delaware to appoint a non-opt-out class representative empowered to release his exclusively federal claims. None of these issues needs to be addressed in deciding the case at bar, but the Court should be aware of them so as to be alert not to give the appearance of having given its imprimatur to the Third Circuit's disposition of them.

III. ARGUMENT

A. The "Delaware Settlement" Is a Major Abuse of Class Action Procedure Which Should Be Ended by This Court.

Last year, the Chairman of the SEC voiced "concerns about private securities litigation and the role it plays in the vital process of capital formation." *Remarks by Chairman, Arthur Leavitt . . . Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994*, at 2. Among "indications that our current system is flawed," he mentioned that "virtually all securities class actions are settled for some fraction of the claimed damages, and some allege that settlements often fail to reflect the underlying merits of the cases." *Id.* at 3. He criticized law firms' "maintaining an inventory of shareholders to serve as nominal plaintiffs in class action filings," and expressed his "especial[ ] interest[ ] in ways to give shareholders greater control over their own litigation and curb potential conflicts of interest between class action lawyers and the shareholders they represent." *Id.* at 6.

A major target of these strictures is the "Delaware settlement," which has become, like the "Nevada divorce," a classic abuse that brings scorn on the legal system. Holding in readiness a stable of clients who own stock–often, it seems, in only trivial amounts–in nearly every publicly traded company, a relatively small number of lawyers scrutinize the business news, and immediately upon sighting a transaction that might be vulnerable to a claim of breach of duty by a company's directors, file a class action–usually a non-opt-out class action in equity–against the company in state court under state law. (See the description of various practices in *Garr* v. *U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994).) After minimal discovery, the claim is settled for a cosmetic consideration and a large

attorney's fee. The lawyer–nominally, of course, the "class representative"–gives in return a general release that purports to cover all claims, state and federal, arising out of the transaction. The state court approves the settlement. The only winners, of course, are the lawyers and the defendant companies, who are happy to pay the lawyers generously for a "plenary indulgence" or "vaccination." Substantial stockholders with genuine claims are frozen out.

The legal trade press has long regarded the "Delaware settlement" as, quite simply, a scandal. We respectfully refer the Court in particular to Borden, *The Shareholder Suit Charade: The Wilmington Filers shake down corporations in Delaware, and no one seems to mind*, AMERICAN LAWYER (Dec. 1989) 67. Rather than quote from the text, we ask the Court's indulgence for our reproducing its first page on the following page, on the theory that quoting one picture is worth quoting a thousand words:

The Shareholder Suit Charade
PLAINTIFF
DEFENDANT
The Wilmington Filers shake down corporations in Delaware, and no one seems to mind.
By Anthony Borden

Legal scholars have likewise expressed dismay over the phenomenon. "Much like the production of sausage and legislation," Professor John C. Coffee, Jr., of Columbia Law School has written, "the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely." Coffee, *Suspect Settlements in Securities Litigation*, NEW YORK

LAW JOURNAL, March 28, 1991, p. 5 col. 1. At least two major studies corroborate what Professor Coffee described as the long-available anecdotal evidence that "the result can be collusive settlements in which low recoveries are exchanged for high plaintiffs' attorneys fees." *Ibid.* In one, Professor Roberta Romano of Yale studied 83 settlements of stockholder actions and confirmed, among other things, that attorneys' fees loomed far larger than plaintiffs' recoveries. In settlements that afforded only structural relief, the value of such relief, she concluded, was "inconsequential." Romano, *The Shareholder Suit: Litigation Without Foundation?*, cited in Coffee, *Suspect Settlements, supra.* Another study, by Professor Janet Cooper Alexander of Stanford Law School, demonstrated that "the strength of the plaintiffs' case on the merits did not appear to be a significant factor in determining the outcome." Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STANFORD L. REV. 497, 500 (1991).[2]

The general press is likewise well aware of the scandal. See, *e.g.*, Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, p. A15. "*Millions for Us, Pennies for You*," trumpeted a headline in the *New York Times* in late 1993, with the

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[2] See also, *e.g.*, Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. (Summer 1985) 5, 26-33; Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232-33, 239-46 (1983). See also *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, S. HRG. 103-431, 103D CONG., 1ST SESS. 44-46, 117, 305-307, 416-417, 458, 461-62, 602 (1993).

subhead: "*Suits on behalf of investors enrich lawyers. But what of their clients*?" NEW YORK TIMES, December 19, 1993, Section 3, p. 1. ("[T]he law firms representing these investors can win approval for settlements of a few cents on the dollar for their clients while pocketing millions of dollars–even tens of millions–for themselves. . . .' The only people who make money in these are the claimants' lawyers, and the defendants themselves, who shut off a lot of potential liability.' . . . 'The lawyers' interest shifts from protecting the investor to protecting the deal.'") See also Moses, *Off to Court: Lawyer Given To Filing Shareholder Lawsuits Comes Under Scrutiny,* WALL ST. JOURNAL, October 28, 1992, p. 1, col. 8.

The practice of maintaining a stable of stockholders from which plaintiffs could be "pressed into service at the drop of certain stock prices" received general publicity as a result of *Greenfield* v. *U.S. Healthcare, Inc.*, 146 F.R.D. 118 (E.D. Pa. 1993), *affd. sub nom. Garr* v. *U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994). See, *e.g.*, Moses, *Three Shareholder Lawyers Sanctioned,* WALL ST. JOURNAL, February 5, 1993, p. B7, col. 1.

According to an industry newsletter, in 1993 the eleven law firms involved in the greatest number of settlements of stockholder class-action lawsuits were in an average of 18.5 such settlements each, or one every three weeks. The top firm was involved in 40 such settlements, and the runner-up in 26. Bowers & Gupta, *Shareholder Suits Beset More Small Companies,* WALL ST. JOURNAL, March 9, 1994, p. B1 col. 5.

Adverse public attention to class action settlements is not, of course, restricted to securities cases. See, *e.g.*, a lead editorial headed "*Coupon Clipping for Lawyers*" in the WALL STREET JOURNAL, November 18, 1993, p. A20 col. 1 ("[W]e have a hard time believing the lawyers deserve their money for producing a settlement in

which all the real money goes to the lawyers. . . . Funny, we thought the justice system was supposed to have something to do with, well, justice.") See also Lambert, *Public Interest Law Group Fights Some Class Settlements as Unfair,* WALL ST. JOURNAL, August 17, 1995, p. B4; Baron, *An Asbestos Settlement With a Hidden Agenda,* WALL ST. JOURNAL, May 6, 1993, p. A11, col. 3; Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature,* WALL ST. JOURNAL, June 26, 1992, p. 1, col. 1.

Finally, see generally Judge Becker's scholarly analysis of the potential for abuse of class action settlements in *In re GMC Pick-Up Trucks Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

The key element of the Delaware settlement industry is the ability of the purported class representative to release all claims, *including federal ones.* Otherwise the indulgence is not plenary; and if it is not plenary it will not command much of a price. Professor Coffee eloquently summarized the implications of this at the time of the first case to bless it, Judge Selya's opinion in *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991):

> "[F]or the litigator, the most interesting recent development in securities litigation may be the appearance of *a new technique by which a collusive settlement–that is, a non-adversarial settlement that maximizes the attorney's interest at the expense of the client's*–can be negotiated.
>
> . . . .
>
> "Because the general release issued to the defendants in the state court settlement resulted in issue preclusion, the consequence was that no court, state or federal, could hear plaintiffs'

claims of proxy fraud. The seeming paradox in *Nottingham Partners* is that a state court settlement can have preclusive effect despite the fact that the state court lacked subject matter jurisdiction over the claims thereby barred.

"While the legal issue of when one court has the power to approve the release of claims pending in another forum is complex, the practical message to plaintiffs' counsel is much simpler: *weak derivative and class action claims that once would have been routinely dismissed by the Delaware Chancery Court now have an enhanced settlement value, because they can confer immunity with respect to . . . federal securities class actions, which often would have a significant settlement value.*

"Ironically, the incentives for defendants are even clearer: never seek dismissal on the merits of a state class action if a companion federal class action raising related federal claims is possible, but instead reach a settlement in which the defendants are given a general release. If properly structured to fall within the *Nottingham Partners* precedent, such a release will preclude a federal class action raising federal securities claims.

"This type of settlement can be described as 'collusive' because the parties to the state court settlement are effectively depriving absent players–the plaintiffs and their attorneys in the federal action–of their day in court. The net result is effectively both a wealth transfer from the federal plaintiffs' attorneys to the state plaintiffs' attorneys and *a reduction in the total recovery to the class (because the state plaintiffs' attorneys are settling federal claims that they can never win, but can only settle, and should thus accept a lesser settlement than would the federal plaintiffs' attorneys).*

"Although it is still premature to predict that Rule 10b-5 actions will become an endangered species, the possible end result of *Nottingham Partners* will be that the already well-traveled road to the Delaware courts could become a six-lane highway as plaintiffs and defendants rush to settle there before a federal court can stay them."

After pointing out that in the companion state case the Delaware Supreme Court had held that a non-opt-out class was permissible when the action primarily sought equitable relief, Professor Coffee observed:

"... Delaware's approach poses a major hurdle for securities plaintiffs because it is easily manipulated. ...

"... [E]ven plaintiffs who have filed an earlier action for monetary damages in federal court are in trouble, because a Delaware action can always be brought for injunctive relief and will predictably settle quickly in order to be used as a barrier to the federal action."

Coffee, *Suspect Settlements in Securities Litigation, supra* (emphasis added).

The case at bar is an especially cynical example of the use of the "Delaware settlement" to block legitimate federal claims, involving as it does the attempted revival of a state case already determined to be meritless, in order to use its settlement to block a pending federal action.[3]

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[3] Whether the federal action is filed before or after the state action is, of course, irrelevant to the question of the effect of a "Delaware settlement" on the federal action.

B. Three Points Which Amicus Respectfully Suggests the Court Bear in Mind in Formulating Its Opinion in This Case.

In *Grimes* v. *Vitalink, supra,* Grimes encountered several problems in connection with a "Delaware settlement" which this Court should be aware of so that its opinion in this case will not inadvertently give the appearance of approving them.

That case was an Exchange Act class action brought by Grimes and another Vitalink Communications Corporation stockholder, G.W. Holbrook, under Rule 10b-5 and other appropriate provisions, alleging inadequate disclosure of the value of Vitalink stock in connection with management's recommendation that a tender offer for Vitalink's shares be accepted. A non-opt-out Delaware class action arising out of the same transaction (but based on entirely different allegations) had been settled for a sweeping release of all claims a scant few weeks after its initiation, over Grimes's vigorous objections. The district court for the Eastern District of Pennsylvania held that Grimes and Holbrook's federal action was barred by this "Delaware settlement," and the Third Circuit affirmed.

1. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That Breach of Fiduciary Duty Claims Under Delaware State Law Depend on the Same Facts as Do Federal Disclosure Claims.

As noted, the Vitalink litigation involved a tender offer for shares of Vitalink. Promptly upon announcement of the tender offer, various firms prominent at the Delaware plaintiffs' bar filed purported shareholder class actions (later consolidated) charging that Vitalink's management, by the assurance to them of safe jobs with the acquiring company, had

been induced to accede to the acquisition without taking steps to maximize Vitalink's value in the marketplace, thus breaching their fiduciary duties of loyalty and care owed to the stockholders under Delaware law.

The Delaware state court action was based exclusively on management's alleged putting of their own interests first. It was not an action for breach of any duty of disclosure or "candor" and made no allegation of that kind. Aside from the basic story of the tender offer itself, the Delaware action had no factual overlap with a disclosure case such as the federal case subsequently filed by Grimes and Holbrook.[4]

Nevertheless, the Third Circuit said that the federal case before it depended on the "very same set of facts" as had the state case, 17 F.3d at 1564; see also *id.* at 1556, so that disposition of the one disposed of the other by issue preclusion. That the court could make such a statement was inexplicable to us then and remains inexplicable today. This was the basis for one of the questions presented in Grimes and Holbrook's petition for certiorari.[5]

In the case at bar the court below understandably proceeded on the erroneous impression that in *Grimes*

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[4] The allegations of the consolidated complaint in the Delaware action, and of Grimes and Holbrook's complaint in their federal case, are laid side by side in Table 1 at pp. 122a of the Appendix to Grimes and Holbrook's petition for certiorari in No. 93-2098 (hereinafter "App. in No. 93-2098").

[5] "[D]id the court below err in holding . . . [t]hat a state can empower the representative plaintiff in a non-opt-out class action to give a release, binding on all class members, of claims based on a different set of facts from those on which the class action is based?" Petition for Certiorari in No. 93-2098 at ii (Questions Presented, No. 3(c)). See also *id.* at 25-26.

v. *Vitalink* the state and federal cases did indeed depend on the same set of facts, saying that it would "break new ground" for it to give "preclusive effect to a state court judgment that extinguishes exclusively federal claims that are factually unrelated to the state claims pleaded in the class action," and specifically stating that it "need not decide whether to follow *Nottingham Partners* and *Grimes* in giving preclusive effect to a class action settlement that releases exclusively federal claims that turn on the same underlying facts as the state claims." 50 F.3d at 664; see also at 668 n.34.

We respectfully urge the Court to avoid this error in any discussion of *Grimes* v. *Vitalink* in the present case. It would be unfortunate if it could be argued in the future that the Court had placed its imprimatur on the proposition that the issues involved in a Delaware claim for breach of fiduciary duty are so identical with those involved in a federal disclosure claim that disposition of one can extinguish the other by issue preclusion. Circumstances can be imagined in which such a proposition could be used to circumvent a holding in this case designed to restrict abuse of the "Delaware settlement."

2. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That Merely Objecting to a Proposed Class Action Settlement on the Ground That It Releases Claims That Were Never Pleaded Constitutes Issue-Preclusive Litigation of the Underlying Facts of Those Claims.

In the Vitalink litigation, Grimes considered that the settlement agreed to by the "representative" plaintiffs' lawyers was inadequate. In return for what he considered to be only cosmetic changes in the tender offer (plus a fee to the "representative" plaintiffs' lawyers), the sweeping release would purportedly give

up all claims–including disclosure claims under state law and the disclosure claims under federal law that formed the basis for the subsequent federal action, none of which had been either advanced or explored by the "representative" plaintiffs' lawyers. He accordingly appeared at the settlement hearing to oppose approval on this and other grounds.[6]

The settlement hearing was held on written submissions and oral argument, without formal evidence or testimony. This is normal Delaware practice. The court does not decide the merits of the case or of any other claim that may be discussed in evaluating the settlement; rather, it generally evaluates the claims, and balances, based on its *business judgment*, its appraisal of what is being received against its appraisal of what is being given up. *E.g.*, *Barkan* v. *Amsted Industries, Inc.*, 567 A.2d 1279 (Del. Super. 1989); *Rome* v. *Archer*, 564 A.2d 1089 (Del. Super. 1989); *Polk* v. *Good*, 507 A.2d 531 (Del. Super. 1964). The settlement hearing in the Vitalink matter was of this nature, see App. in No. 93-2098 at 54a, 59a-85a, and indeed the state court was explicit that "*it is not necessary for the Court to decide the merits of the case.*" *Id.* at 60a (emphasis added).

Nevertheless, the Third Circuit deemed that by so appearing and objecting, Grimes had "actually litigated" disclosure claims so as to be bound by issue preclusion. It said that the state courts "rejected Mr.

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[6] By way of background, we note that Grimes and the other absent class members had been given neither notice of the class certification nor a chance to protest its non-opt-out feature; nor, just as in the case at bar, was any information ever provided as to who the Delaware "representative" plaintiffs were, whether they were really Vitalink stockholders at all, or whether and why they were representive of the class–even though Delaware law requires such a determination. *Prezant* v. *De Angelis*, 636 A.2d 915, 923-26 (Del. 1994).

Grimes' disclosure claims," 17 F.3d at 1558; that "Grimes pursue[d] the . . . disclosure claims through the Delaware court system," *ibid.*; that "the facts that underlie the federal non-disclosure claims were *actually litigated* during the state court proceeding and were *conclusively resolved* against the objectors," *id.* at 1562 (emphasis added). It held accordingly that this "actual litigation" bound Grimes by issue preclusion.

That the court could make such statements was inexplicable to us then and remains inexplicable today. "Actual litigation" for issue preclusion purposes requires that an issue necessary to the decision be raised, submitted for determination, and actually determined, with opportunity to present evidence and rebut opposing evidence. RESTATEMENT, JUDGMENTS 2D § 27 comment *d*; *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 483-84 (1982); *Halyalker* v. *Board of Regents*, 72 N.Y. 261, 527 N.E.2d 1222, 532 N.Y.S.2d 85 (1988); *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 459 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); *Eastman* v. *Symonds*, 108 Mass. 567, 569 (1871). A class action settlement hearing is not such a procedure and "is not the procedural stuff from which binding determinations of fact can be drawn." Haudek, *The Settlement and Dismissal of Stockholders' Actions*, 23 Sw. L.J. 765, 809 (1969). This was the basis for another of the questions presented in Grimes and Holbrook's petition for certiorari.[7]

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[7] "At a state court hearing on whether to approve a class action settlement, there is no presentation of evidence or decision on the merits; the court merely generally evaluates, in the light of its business judgment, what the respective sides would give up and receive in the settlement. If at such a hearing a person does no more than argue that the settlement should not be approved because it purports to bargain away substantial claims (including federal claims which were not, and could not have been, presented in the action), has the person thereby 'actually litigated' the facts of those claims, so as to be foreclosed by issue preclusion?" Petition for Certiorari in No. 93-2098 at i (Questions Presented, No. 2). See also *id.* at 21-23.

In the present case the court below understandably proceeded on the erroneous impression that in *Grimes* v. *Vitalink*, quoting the Third Circuit, "the 'facts that underlie the federal non-disclosure claims were actually litigated during the state court proceeding and were conclusively resolved against the objectors, here the federal plaintiffs.'" 50 F.3d at 664.

We respectfully urge the Court to avoid this error in any discussion of *Grimes* v. *Vitalink* in the present case. It would be unfortunate if it could be argued in the future that the Court had placed its imprimatur on the proposition that merely opposing a Delaware settlement constitutes issue-precluding "actual litigation" of the facts of a federal claim. Circumstances can be imagined in which such a proposition could be used to circumvent a holding in this case designed to restrict abuse of the "Delaware settlement."

3. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That a Non-Resident's Tender of Stock in a Delaware Corporation Pursuant to a Tender Offer Justifies the Delaware Courts in Forcing Him Into a Non-Opt-Out Class in Which His Federal Rights Can Be Released Without His Consent.

We note finally that in *Grimes* v. *Vitalink*, plaintiff Holbrook (a Connecticut resident) had not appeared in the settlement hearing, so that he could not be charged with having "actually litigated" anything and could not be held bound by the settlement on any prior adjudication theory. The Third Circuit held that he was

bound anyway, on the ground that the Delaware court had personal jurisdiction over him because he had tendered his stock in a Delaware corporation "with knowledge of his status as a member of the plaintiff class in a pending class action lawsuit" containing appropriate procedural protections and had thereby somehow "invoked the benefits and protections of Delaware law." 17 F.3d at 1559-60. This was unintelligible to us then and remains unintelligible today. It was the basis for yet another of the questions presented in Grimes and Holbrook's petition for certiorari.[8] To the extent it is intelligible at all, it is plainly inconsistent with *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), holding that even being a stockholder and an active officer or director in a Delaware corporation is not a "minimum contact" with Delaware for personal jurisdiction purposes. In any event, the question whether and when a state court judgment can be held to foreclose litigation of an exclusively federal claim is not a matter of personal jurisdiction.

We respectfully urge the Court to keep the foregoing in mind in any discussion of *Grimes* v. *Vitalink* in the present case. It would be unfortunate if it could be argued in the future that the Court had placed its imprimatur on this puzzling determination as to personal jurisdiction, which among other things might be deemed to justify forcing a person into a non-opt-out settlement class in which such person's

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[8] "[D]id the court below err in holding . . . [t]hat if a nonresident stockholder in a Delaware corporation sells his stock, in New York, to a third party in response to a tender offer, that is a sufficient 'minimum contact' with Delaware to support personal jurisdiction, at least if there is pending some Delaware state lawsuit, related to the tender offer, in which a class including the stockholder might be certified?" Petition for Certiorari in No.93-2098 at i-ii (Questions Presented, No. 3(a)). See also *id.* at 24-25.

exclusively federal rights might be released notwithstanding the Court's decision in the case at bar–and indeed is fraught with potential mischief in many contexts.[9]

IV. CONCLUSION

The class action device–meant to *help* plaintiffs, not to *hurt* them–has gone off the rails. In particular, the "Delaware settlement" is an embarrassment to the law that should be dealt with by this Court. Its key is the notion that a state court to which Congress has denied any power over federal securities law claims can nevertheless force upon the holder of such a claim an agent authorized to sell it. This Court should affirm the judgment of the court below and take this opportunity to put an end to the abuses of the "Delaware settlement." If in doing so the Court has occasion to refer to the Third Circuit's opinion in *Grimes* v. *Vitalink*, it should be alert not to appear to approve aspects of that opinion that might give the "Delaware settlement" industry means to circumvent the Court's decision.

Respectfully submitted,

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[9] See, *e.g.*, its use in *Pritzker* v. *Yari*, 42 F.3d 53, 62 n.7 (1st Cir. 1994).